

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KEVIN K. GAGLIARDI and DEPARTMENT OF HEALTH & HUMAN  
SERVICES, SOCIAL SECURITY ADMINISTRATION, Las Vegas, Nev.

*Docket No. 96-2010; Submitted on the Record;  
Issued September 8, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether appellant has met his burden of proof to establish that he sustained an emotional condition while in the performance of duty.

On September 29, 1993 appellant, then a 41-year-old technical assistant, filed a claim alleging that in December 1992 he first became aware that his stress, depression, headaches, back pain and complications of diabetes were caused or aggravated by his employment.<sup>1</sup>

In an accompanying detailed narrative statement, appellant cited to incidents that caused his emotional condition. Appellant made the following allegations: (1) reassignment to the employing establishment's district office and offices within the district while other supervisors remained in their same units, and the method used to notify appellant of the reassignment; (2) being treated differently from other supervisors by management; (3) maintaining very high work expectations and excellent, or outstanding appraisals; (4) providing immediate results with deficient staff and resources, and changes in procedures; (5) intimidation by Ms. Cathy Labrum, a staff officer, which created a tense environment; (6) negative discussions regarding performance with Ms. Labrum; (7) working overtime; (8) problems with his staff, particularly a grievance filed by Betty Namuth, an employing establishment employee and the August 1990 meeting with Ms. Namuth, Ms. Namuth's union representative and Ms. Barbara Salzman, an employing establishment district manager; (9) unfair denial of applications for promotions; (10) fear of possible elimination of his position; and (11) an increase in his work load.

Appellant's claim was also accompanied by medical evidence regarding appellant's physical conditions which included diabetes and related conditions, a heart condition, hypertension, a history of nonbleeding peptic ulcer disease, a status post tonsillectomy, a status post right nose biopsy due to a history of valley fever and allergic reaction to Tetanus Toxoid, a back condition, paranasal sinuses, and a head condition.

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<sup>1</sup> Appellant stopped work in May 1993 and retired on disability on September 2, 1993.

By letter dated October 28, 1993, the Office of Workers' Compensation Programs advised the employing establishment to submit responses to specific questions regarding appellant's work activities. By letter of the same date, the Office advised appellant to submit responses to specific questions and detailed medical evidence supportive of his claim.

The Office received the November 15, 1993 report of Dr. Kenneth G. Fox, a family practitioner, addressing appellant's physical conditions and that appellant had depressive illness associated with anxiety over his general medical status. Dr. Fox opined that appellant's illness had been affected by the stresses and demands of his employment. Dr. Fox stated that appellant felt a compulsion to perform and try to meet his supervisor's needs and goals which placed an additional physical and mental strain on appellant and could exacerbate appellant's diabetes. Dr. Fox further stated that this could lead to increasing incidents of illness in general such as, upper respiratory infections and appellant's general medical problems. Dr. Fox further stated that the stresses of appellant's employment could have aggravated appellant's general medical condition leading to increased difficulty controlling appellant's sugar levels which produced changes in appellant's visual system, distal feet, and general stresses and depression.

By letter dated December 3, 1993, the Office advised appellant that it had received Dr. Fox's report. The Office further advised appellant to submit a narrative statement providing responses to the questions posed in its October 28, 1993 letter and a report from his treating psychiatrist or psychologist.

By letter dated January 2, 1994, appellant responded to the Office's request. Appellant submitted a January 4, 1994 report of Ms. D. Meyerson, a licensed marriage and family therapist, indicating a history of her treatment of appellant and the difficulties that appellant experienced at the employing establishment. Ms. Meyerson opined that appellant's depression was a direct result of his employment. Appellant also submitted a December 28, 1993 narrative statement reiterating the allegations he made in his previous narrative statement. Appellant also submitted employment records, and correspondence from the employing establishment regarding district performance and improvement of performance ratings. Appellant resubmitted his previous narrative statement.

By letter dated January 13, 1994, the Office advised appellant that Dr. Fox's report and that Ms. Meyerson's report were insufficient to establish his claim.

In a January 12, 1994 letter, Ms. Salzman responded to the Office's October 28, 1993 letter stating that contrary to appellant's statement, the employing establishment was not particularly understaffed, but that it was being downsized. Ms. Salzman further stated that although appellant was the sole technical assistant after the other technical assistant had been reassigned in November 1992, an entire category of review work and most of appellant's training assignments had been removed from him to make his work load manageable. Ms. Salzman also stated that the employing establishment had been supportive and lenient towards appellant regarding his need for medical, sick and annual leave, and that heavy demands were not placed upon appellant due to his numerous medical conditions. Ms. Salzman indicated that Ms. Labrum was firm, a workaholic and a no-nonsense person, but that her manner of supervision was certainly appropriate. Ms. Salzman stated that appellant should have bounced back from incidents that he experienced with Ms. Labrum inasmuch as she had not supervised appellant for

many years. Ms. Salzman further stated that there was nothing unusual or demanding about appellant's job requirements, and that appellant was given great latitude due to his physical ailments. Ms. Salzman noted that she received complaints from employees about appellant's sometimes abusive and irrational behavior towards them and the authoritarian and demeaning manner in which he spoke to them. Ms. Salzman also noted the meeting between Ms. Namuth, appellant, a union representative and herself regarding Ms. Namuth's complaints. Ms. Salzman concluded that appellant was very successful at his technical assistant duties. Ms. Salzman's letter was accompanied by a description of appellant's position of operations supervisor and technical assistant.

The Office received Dr. Fox's March 9, 1994 medical report indicating appellant's physical conditions and that appellant suffered from severe depression. Dr. Fox opined that appellant was not able to perform any work-related duties due to his physical and mental conditions.

By letter dated March 7, 1994, appellant submitted the February 28, 1994 medical report of Dr. Lewis M. Etcoff, a Board-certified clinical neuropsychologist, revealing a review of appellant's medical records, his findings on psychological examination, and a history of appellant's education, employment and medical treatment. Dr. Etcoff indicated that appellant told him that he enjoyed work until downsizing by the employing establishment, that he experienced difficulty in obtaining the necessary tools and implements to perform his job, and that the departure in November 1992 of a coworker caused an increase in his work load. Dr. Etcoff diagnosed generalized anxiety disorder, dysthymia, recurrent mild major depressive disorder without psychotic features, psychological factors affecting appellant's physical condition, insomnia related to another mental disorder, obsessive-compulsive and schizoid personality features, and moderated psychosocial stressors. Dr. Etcoff opined that appellant was disabled from work due to his physical and psychological problems. Dr. Etcoff further opined that appellant was the type of individual who appeared to have difficulty in stressful work situations involving interpersonal conflict which appeared to be an aggravating circumstance in appellant's claim.

By letter dated March 18, 1994, the Office advised appellant that the medical evidence submitted was insufficient to establish his claim. The Office also advised appellant to clarify the meeting between Ms. Namuth, other management personnel and himself. In an April 6, 1994 response letter, appellant stated that the meeting took place to address Ms. Namuth's grievance against him. Appellant also stated that he broke down into tears twice during the meeting and that he was unable to calm down after a break. Appellant further stated that he sought counseling from the employing establishment. Appellant's letter was accompanied by documents regarding Ms. Namuth's grievance against him.

By letter dated April 1, 1994, Ms. Salzman submitted additional factual evidence regarding the August 1990 meeting. Ms. Salzman stated that the meeting took place in late August 1990 and was convened to address the problems between appellant and Ms. Namuth. Ms. Salzman stated that while Ms. Namuth was stating how she felt about the problems between appellant and herself, appellant became extremely emotional, began to cry and shake, and ran out of the room. Ms. Salzman then stated that on two different occasions that day, she tried to

resume the meeting, but that appellant was unable to continue the meeting. Ms. Salzman granted Ms. Namuth relief on her grievance on August 31, 1990 because appellant had exhibited the same type of behavior that Ms. Namuth had described during a private meeting with her. Ms. Salzman further concluded that appellant's behavior was graphic evidence that he was no longer able to perform in a supervisory role. Ms. Salzman's letter was accompanied by documents concerning Ms. Namuth's grievance and job performance. The Office received an April 8, 1994 internal routing and transmittal slip from Ms. Salzman providing that she agreed with appellant's presentation of the facts, but that the stresses presented by appellant were normal for the supervisory job and all the supervisors faced these problems.

By letter dated June 22, 1994, the Office referred appellant along with medical records, a list of specific questions and a statement of accepted facts to Dr. Randall M. Foster, a Board-certified psychiatrist and neurologist, for a second opinion examination.

Dr. Foster submitted a July 30, 1994 medical report reviewing a history of appellant's medical treatment, family, education and employment, and his findings on psychological examination. Dr. Foster diagnosed appellant's physical conditions, and major depression without psychotic features and panic disorder. Dr. Foster stated that possible causes of appellant's stress at work included, appellant's reluctance to take medication, and fluctuations in appellant's weight which suggested that appellant's dietary habits were not uniform and that the amount of insulin that appellant was taking may not have been appropriate during those times. In addition, Dr. Foster stated that there were lapses in appellant's appointments which suggested that appellant did not seek medical treatment for his condition on a regular basis. Dr. Foster further stated that appellant's physical conditions, which predated the 1990 event, led to appellant's feelings of helplessness. Dr. Foster explained that anger is a response to seeing oneself as helpless and stated that appellant's anger probably led to depression which subsequently became more severe leading to his behavior toward Ms. Namuth. Dr. Foster explained that there was no doubt that appellant's behavior during the meeting aggravated his depression. Dr. Foster stated that appellant's crying during the meeting was evidence of his depression, but that appellant's reaction to worsening conditions due to downsizing had been experienced by employees everywhere especially in recent times. Dr. Foster stated that appellant had problems that made supervision difficult for him and that his perfectionism made changes more difficult. Dr. Foster stated that there was nothing in the record to indicate that appellant was singled out for any adverse treatment. Dr. Foster stated that it was difficult to conclude appellant's depression was related to work events anymore than they would have been anywhere else. Dr. Foster concluded that appellant was disabled from work due to his physical problems even without the depression and panic disorder.

By decision dated September 30, 1994, the Office found the evidence of record was insufficient to establish that appellant sustained an emotional condition while in the performance of duty. In an accompanying memorandum, the Office found that the July 1990 grievance filed by Ms. Namuth and the August 1990 meeting regarding Ms. Namuth's grievance occurred in the performance of duty. The Office also found that the following incidents did not constitute compensable employment factors: (1) appellant's frustration over being required to supervise different units in the employing establishment's Las Vegas district office; (2) appellant's unhappiness with Ms. Labrum; (3) appellant's inability to meet quotas in the branch office, to

maintain the telephone system and to handle additional work load after the other technical assistant left the employing establishment; (4) appellant's lateral transfer into a nonsupervisory technical assistant position subsequent to the August 1990 meeting; (5) the denial of appellant's applications for promotions; (6) appellant's defensive, authoritarian and heavy-handedness demeanor with his employees; and (7) appellant's disability retirement. The Office further found that the weight of the medical evidence of record rested with that of Dr. Foster.

In an August 31, 1995 letter, appellant requested reconsideration of the Office's decision. Appellant's request was accompanied by the definition of a licensed marriage and family therapist pursuant to Nevada state law and medical bills. Appellant's request was also accompanied by a June 26, 1995 medical report from Dr. David L. Silverman, a Board-certified psychiatrist and neurologist, indicating a history of appellant's medical treatment and employment, and a review of appellant's medical records. Dr. Silverman diagnosed appellant's physical conditions, generalized anxiety disorder and obsessive compulsive personality features. Dr. Silverman opined that appellant has had significant depressive episodes and generalized anxiety which required treatment with psychoactive medication and therapy going back to at least 1990. Dr. Silverman further opined that appellant's job contributed to his stress.

By decision dated December 4, 1995, the Office denied modification of the September 30, 1994 decision.

The Board finds that appellant has failed to meet his burden of proof to establish that he sustained an emotional condition while in the performance of duty.

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his federal employment. To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his emotional condition.<sup>2</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Distinctions exist as to the type of situations giving rise to an emotional condition which will be covered under the Federal Employees' Compensation Act. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or

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<sup>2</sup> *Wanda G. Bailey*, 45 ECAB 835 (1994); *Kathleen D. Walker*, 42 ECAB 603, 608-09 (1991).

specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.<sup>3</sup>

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.<sup>4</sup> Therefore, the initial question presented in the instant case is whether appellant has alleged compensable factors of employment that are substantiated by the record.<sup>5</sup>

Appellant has alleged that a directed reassignment and the fear of losing his job due to downsizing by the employing establishment, and having to provide immediate results with changes in procedures caused his emotional condition. The Board has held that disabling emotional conditions resulting from an employee's feelings of job insecurity or a desire to work in a particular environment do not constitute personal injury sustained while in the performance of duty within the meaning of the Act.<sup>6</sup> Therefore, the Board finds that appellant's allegations do not constitute compensable employment factors under the Act.

Appellant has also alleged that harassment, discrimination and intimidation by Ms. Labrum, an employing establishment staff officer, created a tense environment which caused his emotional condition. The Board has held that actions of an employee's supervisor which the employee characterizes as harassment or discrimination may constitute factors of employment giving rise to coverage under the Act.<sup>7</sup> Mere perceptions of harassment and discrimination are not compensable under the Act.<sup>8</sup> To discharge his burden of proof, a claimant must establish a factual basis for his claim by supporting his allegations of harassment with probative and reliable evidence.<sup>9</sup> In this case, appellant has failed to provide sufficient probative and reliable evidence to support his allegations of harassment and discrimination on the part of Ms. Labrum. Rather, the record reveals that Ms. Labrum received complaints from employees regarding appellant's behavior and the authoritarian and demeaning manner in which he treated them.

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<sup>3</sup> *Marie Boylan*, 45 ECAB 338 (1994); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>4</sup> *Margaret S. Kryzcki*, 43 ECAB 496, 502 (1992); *Lillian Cutler*, *supra* note 3.

<sup>5</sup> Unless appellant alleges a compensable factor of employment substantiated by the record, it is unnecessary to address the medical evidence; *see Margaret S. Kryzcki*, *supra* note 4.

<sup>6</sup> *Lillian Cutler*, *supra* note 3.

<sup>7</sup> *Donna Faye Cardwell*, 41 ECAB 730, 741 (1990); *Pamela R. Rice*, 38 ECAB 838, 843 (1987).

<sup>8</sup> *Wanda G. Bailey*, *supra* note 2; *William P. George*, 43 ECAB 1159 (1992); *Joel Parker, Sr.*, 43 ECAB 220 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990).

<sup>9</sup> *Ruthie M. Evans*, *supra* note 8.

Additionally, appellant has alleged that working overtime and an increase in his work load due to downsizing caused his emotional condition. Appellant has also alleged that his emotional condition was caused by the lack of equipment to perform his job duties. The Board finds that these allegations constitute compensable employment factors which arose in the performance of appellant's duties.<sup>10</sup> Ms. Salzman, an employing establishment district manager, stated that although appellant was the sole technical assistant after the other technical assistant had been reassigned due to downsizing, appellant's review work and most of his training assignments had been removed from him to make his work load manageable, that no heavy demands were placed upon appellant due to his numerous medical conditions and that there was nothing unusual or demanding about appellant's job requirements. Ms. Salzman acknowledged that the employing establishment was downsizing its staff. The Board finds the evidence in this case sufficient to establish that appellant was in fact experiencing an increase in his work load due to downsizing by the employing establishment. For this reason, he has established a compensable factor of employment.

Several of appellant's allegations fall into the category of administrative or personnel actions. The Board has held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under the Act as such matters pertain to procedures and requirements of the employer and do not bear a direct relation to the work required of the employee.<sup>11</sup> However, the Board has held that coverage under the Act would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.<sup>12</sup> Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated. Appellant's allegations that he was unfairly passed over for promotion on various occasions,<sup>13</sup> that the employing establishment instituted procedural changes,<sup>14</sup> and that he was expected to perform well at work<sup>15</sup> fall within the category of administrative or personnel actions. The Board finds that appellant has not shown that the employing establishment committed error or abuse with respect to the administrative function of these actions. Thus, appellant has not established a compensable employment factor under the Act in this respect.

The Board finds that the August 1990 meeting with Ms. Namuth, an employing establishment employee, Ms. Namuth's union representative and Ms. Salzman regarding a grievance filed by Ms. Namuth against appellant constituted compensable employment factors. This event is established as having occurred by evidence present in the case record, and by its nature, it arises out of and in the course of appellant's assigned duties. However, appellant's

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<sup>10</sup> See *Lillian Cutler*, *supra* note 3.

<sup>11</sup> *Thomas D. McEuen*, 41 ECAB 387 (1990); *reaff'd on recon.*, 42 ECAB 566 (1991).

<sup>12</sup> *Richard J. Dube*, 42 ECAB 916 (1991).

<sup>13</sup> *William P. George*, *supra* note 8.

<sup>14</sup> *Donald E. Ewals*, 45 ECAB 111 (1993).

<sup>15</sup> *James E. Woods*, 45 ECAB 556 (1994).

burden of proof is not discharged by the fact that he has established employment factors which may give rise to a compensable disability under the Act. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.<sup>16</sup>

The medical evidence of record in this case fails to establish that appellant's emotional condition was caused by the accepted compensable employment factors. The November 15, 1993 medical report of Dr. Fox, a family practitioner, revealing that appellant's emotional condition, as well as, his physical conditions, were caused by appellant's compulsion to perform, and to try to meet his supervisor's needs and goals is insufficient to establish appellant's burden. The factors identified by Dr. Fox do not constitute compensable employment factors, rather they are related to administrative or personnel action. In his March 9, 1994 medical report, Dr. Fox opined that appellant was not able to perform any work-related duties due to his physical and mental condition. However, Dr. Fox failed to identify any specific employment factors as causative of appellant's emotional condition.

The January 4, 1994 report of Ms. Meyerson, a licensed marriage and family therapist, indicating that appellant's emotional condition was caused by factors of his employment is insufficient to establish appellant's burden inasmuch as Ms. Meyerson is not a considered a physician under the Act.<sup>17</sup>

In a March 7, 1994 medical report, Dr. Etcoff, a Board-certified clinical neuropsychologist, opined that appellant was disabled from work due to his physical and psychological problems. Dr. Etcoff further opined that appellant appeared to have difficulty in stressful work situations involving interpersonal conflicts. In a June 26, 1995 medical report, Dr. Silverman, a Board-certified psychiatrist and neurologist, opined that appellant's job contributed to his stress. Drs. Etcoff's and Silverman's medical reports are insufficient to establish appellant's burden because they failed to identify specific factors of employment that caused appellant's emotional condition.

The July 30, 1994 medical report of Dr. Foster, a Board-certified psychiatrist and neurologist and second opinion physician, revealed that appellant's emotional condition was not work related and that appellant was disabled from work due to his physical conditions even without the depression and panic disorder conditions. Dr. Foster's opinion is well rationalized, and based on a complete and an accurate factual and medical background. Inasmuch as appellant has failed to submit medical evidence sufficient to establish that he has an emotional condition causally related to the accepted compensable employment factor in this case, the Board finds that appellant has failed to establish that he sustained an emotional condition while in the performance of duty.

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<sup>16</sup> *William P. George, supra* note 8.

<sup>17</sup> 5 U.S.C. § 8101(2).



The December 4, 1995 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.  
September 8, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Michael E. Groom  
Alternate Member